Indefeasibility

Queensland style

Weir, Michael

Published in:
Australian Property Law Journal

Indefeasibility: Queensland style*

Professor Michael Weir†

Recent amendments to the Land Title Act (Qld) are an attempt by the legislature to create greater discipline in the finance industry by punishing lax identification procedures when dealing with persons purporting to be registered owners. These far reaching changes may improve the integrity of the register but may come at the expense of some fundamental indefeasibility principles. These amendments also clarify the power of the Registrar of Title to correct the register; they introduce a new the limitation period on claims for compensation and deal with some statutory anomalies

Introduction

This article will deal with some of the significant amendments made to the Land Title Act 1994 (Qld) pursuant to the Natural Resources and Other Legislation Amendment Act 2005 (Qld).

These amendments are probably the most significant amendments to the Land Title Act since its enactment in 1994. Some amendments would be deemed as housekeeping while others attempt to deal with a defined mischief but at the same time impact in ways that do not conform to fundamental Torrens title principles.

Identity of mortgagor

The most significant reforms require the mortgagee to ensure the identity of the person purporting to sign a mortgage as mortgagor. These provisions were introduced apparently because of lax practices of certain last resort lenders charging high interest rates for marginal borrowers. The concern was that this would lead to fraud that impacted on the integrity of the register and potentially result in a compensation claim that would result in a claim on the public purse.[1] This concern is based on experiences in Queensland and New South Wales where fraud associated with the registration of mortgages was said to involve 'organised crime' and involved payment of compensation of millions of dollars.[2]

This may have been a reference to cases exampled by *Perpetual Trustees (Victoria) v Tsai*[3] where, without any knowledge of the mortgagor, Mr Tsai, persons who were possibly an organised crime group forged his signature on an all moneys mortgage, then produced a counterfeit certificate of title and registered the mortgage. Young CJ deemed that the mortgage secured nothing unless the mortgagee could confirm that funds were actually lent to the

---

* Based on a paper presented to 8th Real Property Law Teachers Conference, 2007, Hobart, 12–14 July 2007.

† Faculty of Law, Bond University.

1 LIT Alert, issue 44, 1 February 2006.

2 The Minister Hon H Palaszczuk, Minister of Natural Resources and Mines, *Hansard*, Second Reading Speech, 8 November, p 3760.

3 (2004) 12 BPR 22,281; [2004] NSWSC 745; BC200405182.

registered owner. This was one of a number of similar claims in New South Wales that raised claims on the New South Wales Assurance Fund.[4]

The Minister noted a 'small but increasing number of claims for compensation relating to mortgage fraud involving what appears to be a lack of due diligence by some lenders in verifying the identify of borrowers'.[5] The Minister in his second reading speech noted a 2004 claim for compensation for a registered mortgage executed by persons falsely representing themselves to be the owners. The forgers were in fact relatives of the registered owner. These parties obtained a loan of $100,000 with an interest rate of 8% *per month*. The mortgagee did few checks on the identity of the mortgagee and then claimed indefeasibility for that mortgage.[6]

The Registrar of Titles has commented that[7] 'the amendments should have little or no impact on lenders who already undertake reasonable *due diligence* measures as part of their normal lending practices'.

These provisions require mortgagees to take reasonable steps to properly identify mortgagors. Failure to take these reasonable steps means the benefits of indefeasibility may be denied to that mortgagee. It is of concern that in some instances even if these reasonable steps are taken if the mortgage involved fraud the mortgagee may have limits placed on it in regard to the recovery of outstanding monies and costs if the mortgagee exercises its power of sale.

These reforms relate to amendments to sections:

s 185(1A)	Exceptions to indefeasibility
s 11A	Original mortgagee to confirm identity of mortgagor
s 11B	Mortgage transferee to confirm identity of mortgagor
s 188AA	Compensation for which claim may not be made
s 189(1)(ab)	Matters for which there is no entitlement to compensation
s 189A	Limit on amounts recoverable by mortgagee

Pursuant to s 185(1A) a registered mortgagee *does not* obtain the benefits of s 184 (Indefeasibility) if:

(a) that mortgagee has failed to comply with s 11A(2) or in relation to a transfer of mortgage failed to comply with s 11B(2); and
(b) the mortgage was executed by someone other than the person who was or was about to become the registered proprietor

Note that proof of satisfaction of s 11A(2) or s 11B(2) rests with the mortgagee under s 185(5).

Section 11A requires a mortgagee prior to lodgment for registration to 'take reasonable steps to ensure the person who executed the instrument as mortgagor is identical with the person who is, or who is about to become, the registered proprietor of the lot or interest in a lot'. A mortgagee is under subs (3) deemed to take those reasonable steps if it complies with the practices

4 Refer to discussion of this issue in a paper by Associate Professor Pamela O'Connor, Registered Land Title, 'Indefeasibility and the Problem of Bijural Inaccuracy', Paper presented to 8th Real Property Teachers Conference, 2007, Hobart, pp 14–19.
5 Ibid.
6 Ibid.
7 LIT Alert, issue 44, 1 February 2006.

included in the *Land Title Practice Manual* for the verification of identification of mortgagors.[8]

The *Land Title Practice Manual* contains *non-exhaustive* guidelines about what constitutes reasonable steps. It is not intended to outline all the requirements here except to mention they primarily focus on a very minimum '100 points of identification' using primary and secondary identification documents such as birth certificate; certificate of citizenship current passport (70 points each) or drivers licence (40 points); confirmation from a current employer (35 points); electoral roll, the record of a public utility, credit card (25 points) with at least one having both a photograph and signature. If the mortgagor is a company, the completion of a company search and confirmation the execution is authorised is necessary.

In addition to these requirements issues such as whether the names supplied are slightly different from the registered proprietor and evidence suggesting the gender of the person is not correct or the age of the person executing is at odds with what is expected are also relevant considerations. The introduction of these matters, for which there may be reasonable but differing views, may be problematic. It places a burden on the mortgagee to make an assessment of identity based on gender and age upon which the indefeasibility of the mortgage may depend.

It could be argued this raises issues similar to a registered owner who when receiving an interest had sufficient knowledge of the colourable nature of a transaction so as to constitute fraud in registering that interest. This type of behaviour has been deemed as fraud if the court can find wilful blindness to take steps to obtain the truth.[9] This issue was discussed in a number of Australian authorities but it seems the courts in Australia are slow to find fraud by wilful blindness unless actual dishonesty can be imputed.[10]

In the application of these legislative reforms the subtle issues of age and the congruence of names with gender may not be obvious. It is hoped that a test of 'reasonable steps' will apply a not too onerous obligation on mortgagees and the serious consequences of not complying are balanced by a reasonable interpretation of these provisions from the mortgagee's perspective.

A mortgagee must keep records in the approved form of the reasonable steps taken for seven years after registration. The Registrar may query the mortgagee about the steps taken and call for the relevant records and the mortgagee must comply unless it has a reasonable excuse. Similar provisions apply under s 11B in the case of a transfer of the mortgage.

Impact of provisions

Subsequent decisions will be required to clarify this provision but s 185(1A) suggests that should a mortgagee fail to satisfy this provision (ie, the mortgage is registered but the mortgage is signed by someone other than the registered owner or the person who is about to become the registered owner), the

8 Queensland Law Society, para 2-2005.

9 *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* (1923) NZLR 1137.

10 *Pyramid Building Society v Scorpion Hotel* [1998] 1 VR 188 at 196; *Young v Hoger* (2001) QConvR 54-557; [2001] QCA 453; BC200106460.

mortgagee may become a registered interest but will not be in a position to enforce the provisions of the mortgage against the registered owner (presumably the party who has been defrauded) while any subsequent registered proprietor of the lot would take free of the registered interest. The registered owner may seek an order of the Supreme Court to remove the mortgage as is contemplated by s 187(1) of the Land Title Act.

The impact of not following these provisions is profound for a mortgagee that goes beyond 'merely' losing the benefits of indefeasibility. For example, if under s 189 a person is deprived of an interest (such as a mortgagee) and that deprivation can fairly be attributed to a failure to satisfy the steps required under ss 11A and 11B this will provide a ground to refuse compensation.

This provision does change the balance in regard to such matters as against what previously applied. Previously, if a mortgage was registered after execution by someone other than the registered owner, if the mortgagee was not liable on the basis of the fraud exception, then that mortgage would normally be indefeasible.[11]

In some cases a mortgagee has been deemed liable in fraud because the circumstances of the execution suggested that the person signing the mortgage was not necessarily the person they say they are or that the mortgagee has lodged a mortgage knowing that the mortgage was not properly executed.

There has in the past been a degree of favourable treatment for mortgagees where they have not been studious in the identification of mortgagors signing mortgages allowing the mortgagee to rely upon the indefeasibility provision. In fact this was reflected in comments by Minister Palaszczuk in the Second Reading Speech. He states:

> Court decisions have confirmed that negligence, questionable lending practices or wilful disregard of matters which might raise doubts in a prudent persons mind, do not amount to fraud under the Land Title Act 1994.

In *Grgic v ANZ Banking Corporation*[12] the son of the registered owner attended at the offices of the mortgagee with a friend who falsely represented that he was the registered owner and proceeded to sign a third party mortgage for a loan to the son. The registered owner submitted that the bank should be denied indefeasibility for the subsequently registered mortgage because the witnessing of the signature of the imposter by the bank officer involved the bank in a fraud against him or that there was a personal equity entitling the mortgage to be set aside. The registered owner was unsuccessful on both counts. Powell JA acknowledged that the bank was 'less meticulous than they might otherwise have been in seeking to establish that the person who was introduced to them'[13] was in fact the registered owner but this was not fraud and the indefeasibility of the mortgage was confirmed.

A mortgagee is often deemed safe in its indefeasibility except when it is shown the mortgagee knows the instrument has not been properly executed in

---

11 *Frazer v Walker* [1967] 1 AC 569; [1967] 1 All ER 649; *Heron v Broadbent* (1919) 20 SR (NSW) 10. The contrary view might be taken however where there is an all moneys clause secured by the mortgage and there is no evidence the loan has actually been made: *Perpetual Trustees (Victoria) v Tsai* (2004) 12 BPR 22,281; [2004] NSWSC 745; BC200405182.

12 (1994) 33 NSWLR 202.

13 Ibid, at 221.

accordance with statutory requirements or it is a false document. For example, in *AGC v De Jager*[14] the mortgagee was aware that the mortgage had not been signed in the presence of the witness. That was deemed to be fraud and the mortgage was defeasible as a result. Some similar cases have resulted in different results depending on the facts of the case.[15]

In *Mercantile Mutual Insurance v Gosper*[16] the mortgagee was deemed liable under the in personam exception by not confirming instructions directly with the registered owner (wife). The husband fraudulently requested on behalf of his wife a further loan secured by a mortgage variation and then presented a signed variation of mortgage which was in fact forged by the husband. The registered owner had no knowledge of the new loan or the variation of mortgage. This omission was deemed to create a personal equity against the mortgagee that destroyed the indefeasibility of the registered mortgage variation.

Section 185(1)(A) makes it clear that less than meticulous practice will not be sufficient to protect the mortgagee and perhaps it introduces the policy flavour of deferred indefeasibility by placing the onus on the party dealing with the fraudulent party to ascertain their bona fides.[17] As this requires not overly onerous obligations by mortgagees, the hit taken by the concept of indefeasibility may be balanced against hopefully greater register integrity and protection of innocent mortgagors against fraudulent parties.

Section 189A — attack upon indefeasibility?

Probably more troubling are the provisions of s 189A. This section applies to a person registered as mortgagee and the execution involved, or was associated with, fraud. This includes the circumstance that the mortgagor pretended to be someone else or significantly a person executed the mortgage as registered proprietor after executing a transfer to themselves by fraud against a person who is *or was* a registered proprietor of the lot.

189A Limit on amounts recoverable by mortgagee

(1) This section applies if —

(a) a person (the mortgagee) is recorded in the freehold land register as a mortgagee of a lot, or an interest in a lot, under an instrument of mortgage; and

(b) the execution of the instrument of mortgage involved, or was associated with, fraud against a person (the defrauded person) who is or was a registered proprietor of the lot; and

Examples —

1 A person engages in fraud by executing the instrument of mortgage, pretending to be the registered proprietor.

---

14 [1984] VR 483.

15 *National Bank Ltd v Maher* [1995] VR 318 where additional land was added to the mortgage after execution, fraud was found; and *Russo v Bendigo Bank Ltd* [1999] 3 VR 376 where a clerk innocently witnessed signature without one mortgagor being present and deemed not to understand the significance of that act, and was not deemed fraudulent.

16 (1991) 25 NSWLR 32.

17 *In re Land Transfer Act; Ex parte Davy* (1888) 6 NZLR 760.

2 A person executes the instrument of mortgage as registered proprietor, having first engaged in fraud by executing an instrument of transfer, pretending to be the registered proprietor.

(c) the mortgagee is entitled to exercise power of sale over the lot or interest on the basis of the registered mortgage; and

(d) if the position of the defrauded person in relation to the lot or interest is not otherwise rectified, the defrauded person will be entitled to compensation under section 188 for deprivation of the lot or interest.

A mortgagee could conceivably comply with ss 11A and 11B and accordingly take reasonable steps to identify that the person signing the mortgage is in fact the registered owner or about to be the registered owner and be entitled to indefeasibility pursuant to s 184 as outlined above. However, because of a sophisticated fraud the mortgagee may be fooled by forgeries etc that this person is who they say they are. *Note this section also includes a situation where a mortgagee is approached after a fraudulent or forged transfer by the person who is now the registered owner and can presumably prove they are in fact the registered owner*. This is a matter that goes outside the ss 11A and 11B requirements.

If a mortgagee then is entitled to exercise its power of sale as registered mortgagee (this will often arise in these cases) and the defrauded person is entitled to compensation under s 188 (this will often be the case as the registered owner may be now subject to an indefeasible mortgage registered by fraud – assuming ss 11A and 11B are satisfied) then the mortgagee will have its right to recover interest and costs from the sale proceeds restricted despite any provision to the contrary in the mortgage.

If this provision applies the interest that can be recovered is limited to 2% above the official cash rate (at 30 August 2007 — 6.5% and subject to change) which means recovery will be limited to 8.5%. Under current market conditions this may have little impact on many mainstream lenders but will impact lenders of last resort whose interest rate will often exceed this limit. This appears to be the policy focus of these reforms. The Minister commented during the Second Reading Speech that this provision provides for recoverable interest 'well above the interest rate charged on most loans by reputable lenders in Australia'.[18]

In addition, the costs component is limited to 'the costs incurred by the mortgagee in directly protecting the mortgagee's interest as mortgagee of the lot or the interest in a lot, to the extent the costs were reasonably incurred'. Section 189A(4) then specifies as examples of the costs that can be recovered — insurance premiums; rates and land taxes while excluding costs of entry into possession and costs of exercising power of sale — presumably including real estate agents fees; advertising etc that pursuant to s 88 of the Property Law Act 1974 (Qld) can normally be recovered from the proceeds of sale.

The provisions of s 189A are troubling. The provisions outlined above clearly have the policy objective of providing more discipline to a certain sector of the finance industry. This policy view may be supportable but it does place much of the burden on lawyers acting for mortgagees and the mortgagees who are involved in the execution process.

18 Palaszczuk, above n 2, p 3761.

It seems that mortgagees, and in many cases lawyers on behalf of mortgagees, are being penalised in circumstances where they have been totally faultless in their processes. A sophisticated fraud that overcomes the reasonable steps or a prior transaction that is affected by fraud without the knowledge of the mortgagee and in circumstances where it would be difficult to establish the truth will mean the recovery from sale proceeds will be reduced. This places unreal and unfair burdens on mortgagees that will no doubt result in increased costs to lenders and an increase in mortgagee insurance premiums. It is also contrary to the principles of the Torrens system that seeks to protect bona fide registered proprietors including mortgagees who become registered.

This provision is very close to requiring a mortgagee to investigate the chain of title leading up to the registration of a registered owner as once occurred under old system conveyancing and reflects a deferred indefeasibility approach. It is suggested s 189A would be fairer if the reference to the fraud in a prior transaction is deleted.

Section 189A is contrary to the emphasis under the Torrens system in allowing a person acquiring a registered interest in a parcel of land to rely upon the register. It is appropriate that a party be entitled to rely upon the state of the register and assume that if they are in fact the registered owner to accept a mortgage from that party assuming they have no knowledge of the fraud that saw them registered as owner of the property. The purpose of the Torrens system is to not require a party to look behind the curtain of the register on the basis the register should reflect the interests that impact upon a registered owner.[19] The purpose of the Torrens system is to produce a title that is neither historical or derivative.[20] These are fundamental concepts not respected by s 189A, though admittedly a breach of this provision does not put the indefeasibility at risk, it does limit the exercise of the rights of a mortgagee.

Amendments made to s 185 (exceptions to s 184)

In addition to the amendment made to s 185 in relation to s 11A and s 11B another significant amendment to s 185 has been made in relation to omitted easements that deal with an oversight in the legislation when first enacted.

Under the legislation prior to this amendment the exception to indefeasibility in regard to omitted easements included a situation where 'an easement was in existence when the lot burdened by it was first registered but particulars are *no longer* recorded in the freehold land register against the lot burdened'. This refers to land that is converted from the deeds registration system to the Torrens system. The anomaly in the legislation was that if the easement was left off the register during the conversion from the deeds registration system to Torrens Title the easement *never was* on the register. This amendment by the inclusion of a new s 185(3)(a) deals with this anomaly by confirming the exception applies in that situation when 'the easement particulars have *never* been recorded in the freehold land register'.

19 L Griggs, 'Indefeasibility and mistake — the utilitarianism of Torrens' (2003) 10 *APLJ* 108.

20 *Breskvar v Wall* (1971) 126 CLR 376 at 386.

In addition s 185(3)(c) now includes a circumstance where an easement instrument has been lodged for registration but 'because of an error of the Registrar, has never been registered'.

Subsection (4) indicates subs (3) applies whether or not the lot has at any time been transferred or otherwise dealt with. This confirms the case law from cases such as *James v Registrar General*[21] that indicates a subsequent transfer or transfers after an easement is omitted is no defence to the application of this exception by a current registered proprietor who may have no knowledge the easement was previously registered over the property. This provision confirms that the registered owner's interest is always subject to this express exception to indefeasibility even if the registered owner had no knowledge of the error in the register.

Compensation

One of the pillars of the Torrens system is the compensation principle.[22] Thus if a bona fide registered proprietor is deprived of an interest in a lot because of the registration of another indefeasible interest that person should be compensated. Some of these amendments are welcome while others, in my view, erode this principle to an inappropriate level.

Compensation for personal, psychological and psychiatric injury

Section 188AA excludes compensation for personal injury which includes loss of income from personal injury and psychological and psychiatric injury.

Time limit for claim

One continuing issue under the Queensland Torrens system has been the limitation period that applies to commence a claim for recovery of compensation. This can be a difficult issue as a claimant may not have knowledge of a deprivation that may entitle them to claim for some time after being defrauded or deprived of an interest in a lot.

Under the former Real Property Act 1861 a claimant had to exhaust his or her rights against the person who was at fault before claiming compensation within the limitation period of six years after the date of deprivation.

In the famous Queensland High Court case of *Breskvar v Wall*[23] the Breskvars were deemed to have been denied their interest by the fraud of Wall. The sequel to that case was *Breskvar v White*[24] where the Breskvars sought to recover compensation for their loss. Unfortunately for the claimants it took so long to establish that they had been deprived of an interest and then to exhaust their rights against the wrongdoer that they fell outside the limitation period that applied for recovery of compensation for the loss of their interest.

The Land Title Act as first enacted did not contain a limitation period. It was argued that possibly no limitation period applied though it appeared likely that

21 [1968] 1 NSWLR 310.
22 D J Whalan, *The Torrens System In Australia*, Law Book Co, Sydney, p 20.
23 (1971) 126 CLR 376.
24 (1978) Qd R 187.

a six year limitation period may apply under s 10(1)(d) of the Limitations of Actions Act.[25]

This uncertainty was not appropriate. The amendment now provides as follows:

188C Time Limit for Claim

A person applying to the Supreme Court under section 188B for compensation under section 188 or 188A must make the application —

(a) within 12 years after the person becomes aware, or ought reasonably to have become aware, of the circumstances giving rise to the entitlement to compensation; or

(b) within a longer period the court considers just.

The period of 12 years may be extended by a court in an appropriate case. This provides an appropriate level of flexibility to deal with most situations and in some contexts a limitation period well in excess of 12 years would apply.

In New South Wales and Tasmania the limitation period is six years while in South Australia the limitation period is 20 years from the time when the right to make such application or bring or take such action or proceedings first accrued.[26]

Some further exclusion of entitlement to compensation

Section 189 contains a list of those issues for which there is no entitlement to compensation for deprivation, loss or damage. The exclusion in relation to breaches of ss 11A and 11B have been discussed above. Significantly a further exclusion is now found in a new s 189(1)(j) and (k) in relation to omitted or mis-described easements.

The new exclusion in relation to compensation relates to circumstances where:

(j) because the particulars of an easement over a lot have been omitted from the freehold land register; or

(k) because of the misdescription of the particulars of an easement in the freehold land register.

As indicated above it is possible for a party to have their lot made subject to an easement based on s 185(1)(c) and (3) when that party had no knowledge of this error in the register. It now appears they are denied compensation for that loss. This would appear to be a case where compensation should be payable when the current registered owner had no knowledge of the omission. One might speculate a claimant would have to rely on an error by the Registrar under s 188(1)(g) but it seems strange and contrary to the compensation principle to deny a compensation claim in that circumstance.

This appears to be the only Real Property Act in Australia that specifically

25 C MacDonald, L McCrimmon, A Wallace and M Weir, *Real Property Law in Queensland*, 2nd ed, Law Book Co, Pyrmont, 2004, p 446.

26 Real Property Act 1900 (NSW) s 131; Limitations of Actions Act 1974 (Tas) s 4(1)(d) and Land Titles Act 1980 (Tas) s 158; Real Property Act 1886 (SA) s 215.

excludes compensation in relation to the re-registration of an easement previously omitted from the register.

Registrars power of correction

The Registrar's power of correction is found in s 15. The Registrar's power of correction has been controversial in many jurisdictions. In the landmark case of *Frazer v Walker*[27] the New Zealand equivalent of this provision at that time was seen as 'little more than a slip rule'. The provisions of s 15 since 1994 and especially after the latest amendments mean this characterisation is certainly not applicable in Queensland. It seems the Registrar's power of correction now contained within the Land Title Act grants the Registrar some of the most extensive powers of correction in Australia.[28]

In summary, under s 15(1) the Registrar can correct the register if 'the Registrar is satisfied' the register is incorrect and the correction will not prejudice the rights of a holder of an interest recorded in the register. Section 15(8) confirms the rights of a holder of an interest is not prejudiced if the holder acquired or dealt with the interest with actual or constructive knowledge that the register was incorrect and how it was incorrect.

Under the new subs (2) *without limiting subs (1)* the Registrar can correct the register if the register is incorrect because the Registrar has incorrectly recorded a particular or registered an interest *or* the Registrar has held an inquiry under Div 4 and has concluded the register is incorrect including, for example, there has been fraud affecting the register.

The Registrar's power of correction under the Land Title Act in the context of fraud was considered in the Supreme Court decision of *Equitiloan Securities v Registrar of Titles*.[29] In that case Justice Dowsett held that the Registrar did not have the power to deregister a mortgage that was allegedly created by fraud. The Registrar had been alerted to that issue by letters from the solicitors for the registered owner. Justice Dowsett considered that the registered mortgagee was clearly prejudiced by a deregistration. He was also not convinced based on the limited facts at his disposal that the Registrar could be 'satisfied' that the registration was affected by fraud and the mortgagee would not be prejudiced by the deregistration. If a party is in fact registered by fraud it might be suggested that they are not prejudiced by a deregistration as fraud is an express exception to indefeasibility but the facts in that case did not permit the Registrar to draw that conclusion.

This amendment perhaps attempts to deal with that issue by reference to the ability of the Registrar to hold an inquiry under Div 4 of the Land Title Act to determine whether the register is incorrect, including whether fraud has occurred. This may provide the Registrar with grounds to determine if he or she can be 'satisfied' of the matters dealt with in s 15(1) and may in some circumstances permit a broader power to correct the register. This is a power rarely used by the Registrar but this amendment will in practice grant potentially wider powers to augment the power of correction. One wonders if

27 [1967] AC 569.
28 Compare with Transfer of Land Act 1958 (Vic) s 103; Real Property Act 1900 (NSW) s 12.
29 [1997] 2 Qd R 597.

the Registrar may still prefer to rely upon a Supreme Court order under s 187 of the Land Title Act.

Under the new s 15(3) the Registrar is now given power to correct the register even in the case of prejudice to a current interest owner if there has been an omitted or mis-described easement or when the Supreme Court has ordered the correction.

Application by adverse possessor

New provisions in s 98 of the Land Title Act limit the ability to apply for adverse possession based on encroachment. The previous s 98 provided simply that an application for adverse possession was not available for an encroachment under s 182 of the Property Law Act.

The new provisions provide that an application for adverse possession *cannot* be made if:

(a) it relates to only a part of a lot; or
(b) the application is for a lot that may be created in the future by registration of a plan of subdivision; or
(c) is for a lot where the registered owner is the State or another entity representing the state or a local government; or
(d) it arises out of an encroachment that includes an encroachment defined under Part 11 Division 1 of the PLA (encroachment of buildings) or if the enclosure is by a wall; fence; hedge; ditch garden bed or other way of marking the boundary between the lots and those structures are not on the true boundary as shown by the registered plan of subdivision.

This amendment was said to be designed to ensure 'claims cannot be made for land which is "possessed" merely by being enclosed with the claimant's land – that is where a fence is not on the correct boundary'. Somewhat strangely s 108A is then included that purports (despite s 98 above) to allow the Registrar to register an applicant as owner of part of a lot. In that case the Registrar may require the applicant to lodge a plan of subdivision for the relevant lot with the applicant signing the application as if they were the registered owner of the lot assuming the provisions of s 50 (which deal with the relevant formalities) can be complied with. It appears ss 98 and 108A are inconsistent however it would appear s 108A refers to a case where the Registrar, presumably after considering the evidence provided, considers an application for a whole of a lot considers adverse possession is appropriate for only part of a lot.

Conclusion

The Land Title Act 1994 (Qld) is generally a well drafted piece of legislation that provides much greater clarity than it predecessors. Many of the 2005 amendments to the Land Title Act are necessary improvements to the legislation. The amendments that deal with the requirements to identify mortgagors are somewhat radical in nature. They were apparently drafted after consultation with representatives of the finance industry. The reforms introduce an element of uncertainty into the provision of finance that harks

back to issues relevant to deferred indefeasibility. No doubt the requirements for careful identification of mortgages will have financial implications for that industry and for borrowers. The primary aim of the reforms is directed towards the protection of consolidated revenue. One wonders if one casualty of these changes will be some fundamental Torrens Title principles as they apply in Queensland and whether other jurisdictions may choose to follow suit.